UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

PINKERTON, INC.

and   Case 32-CA-19852-1

CALIFORNIA SECURITY OFFICERS UNION

Karen Reichmann, Atty.
NLRB Region 32, for the General Counsel.

Mark S. Ross and Jesse L. Miller, Attys.
Seyfarth Shaw, Attorneys, San Francisco, CA for Respondent.

Michael Millen, Atty.
Law Office of Michael Millen, Los Gatos, CA for the Charging Party.

DECISION

Statement of the Case

WILLIAM L. SCHMIDT, Administrative Law Judge. This case presents two issues: (1) whether a supervisor's statement that the employer would be "killing people off" who were pro-union violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act); and (2) whether the termination of employee Paul McClymont violated Section 8(a)(1) and (3).

California Security Officers Union (Union) filed the underlying unfair labor practice charge against Pinkerton, Inc. (Respondent or Pinkerton) on July 26, 2002.[1] The complaint issued by the Regional Director for Region 32 on December 30, 2002, and amended on May 1, 2003, alleges that Pinkerton violated Section 8(a)(1), through its agent Will Licon, by telling an employee that it would be "killing people off" who were pro-Union. The complaint also alleges that Pinkerton violated Section 8(a)(1) and (3) of the Act by discharging Paul McClymont because he supported the Union and engaged in protected concerted activity.

I heard this case in Oakland, California, on May 15 and May 21, 2003. Having now carefully reviewed the entire record and considered the testimony in light of my impressions about the demeanor of the witnesses,[2] as well as the briefs filed by the General Counsel and the Respondent, I have concluded General Counsel has proven that Respondent violated the Act as alleged based on the following

[1] Unless shown otherwise, all further dates refer to the 2002 calendar year.
[2] My findings reflect credibility resolutions based on factors cited by Judge Medina in *U.S. v. Foster*, 9 F.R.D. 367, 388-390 (1949). I do not credit testimony inconsistent with my findings.

Findings of Fact

I. Jurisdiction

The Respondent, a Delaware corporation with a place of business in Santa Clara, California, provides contract security services. It annually purchases and receives goods valued in excess of $50,000 directly from suppliers located outside the State of California. Based on the foregoing, I find that the Board has statutory jurisdiction over Respondent's Santa Clara operations and that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve this labor dispute. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Relevant Facts

Pinkerton provides contract security services for the Santa Clara Valley Transit Authority (VTA). The VTA operates a public bus transit system and a light rail train. Under this contract, Pinkerton furnishes 123 security officers (approximately 95 unarmed and 28 armed officers), four to five supervising sergeants and lieutenants, two captains and a branch manager. Pinkerton also has a separate branch office in Santa Clara, known as the Wyatt branch (located on Wyatt Drive), which furnishes security guard services for numerous other customers in the area. In addition, the Wyatt branch provides administrative support (payroll and other human resource services) for the Pinkerton VTA contract. Pinkerton's VTA branch operates from the VTA administrative office facility located on River Oaks Avenue. In addition to the small office cubicle at the River Oaks facility, the Pinkerton armed officers share a locker room there with the VTA fare inspectors. That locker room is adjacent to Pinkerton's office cubicle.

At relevant times, Pinkerton's VTA supervision consisted of Ron LeBaudour, the branch manager, two captains (one for the armed patrolmen and one for the unarmed security officers), and four or five lieutenants and sergeants. Edward Fay, who shares the office cubicle with LeBaudour, served as the captain for the unarmed security officers. The shift lieutenants and sergeants, also known as the S-51's after the call sign on the Pinkerton radio system, directly supervise the unarmed security officers posted at the various light rail stop platforms and the VTA bus lot. Until his termination around June 20, Jay Lance served as a Pinkerton lieutenant supervising unarmed security officers. Following Lance's termination, Pinkerton promoted Elizabeth (Lisa) McNeil from sergeant to lieutenant and Will Licon, a non-supervisory flex officer, became a sergeant. Unarmed security officers are posted at each of the VTA's stop platforms and at the VTA bus lot. Some unarmed officers operated under regular schedules and at the same post; others, called flex officers, rotated to different locations on different schedules as needed.

Pinkerton employed Paul McClymont as an unarmed security officer from June 29, 2001, until October 25, 2002. He worked exclusively at VTA light rail stations, primarily the Santa Theresa station. McClymont's regular shift was Monday through Friday, 8:00 A.M. to 4:00 P.M. McClymont received two work-related awards from Pinkerton during his employment at VTA. Until July 23, no Pinkerton supervisor ever disciplined McClymont for any work infraction. Lance characterized McClymont as "very reliable and very professional." As will be seen below, Lance's evaluation of McClymont comports with sentiments expressed by McNeil when she notified McClymont of his removal from the VTA account on July 23.

In late April or early May 2002, the Union began an organizing campaign among the Respondent's security officers. By June, the Union's organizing campaign had intensified. Pinkerton VTA security officers (as well as other VTA employees) distributed union authorization cards to other officers including McClymont, who in turn gave cards to two of his coworkers. After Lance was discharged from Pinkerton in late June, he too handed out union authorization cards to the Pinkerton VTA employees in and around VTA facilities and on VTA trains. Captain Fay learned of Lance's activity and distributed a memo to Pinkerton employees stating that the bus yards where Lance had handed out cards were private property. At some time in June, VTA armed security officers found union authorization cards and union literature in their squad room mailboxes at the River Oaks office. Several officers showed the cards to Edward Fay, the captain who oversees the unarmed security officers, and Ronald LeBaudour, the Pinkerton's VTA branch manager. Fay and LeBaudour discussed the cards, speculating about which employee(s) had put the cards and literature in the mailboxes.

Both LeBaudour and Fay pursued the card distribution episode. For his part, LeBaudour claims that this was the first he knew of the union organizing campaign. When some of the armed officers showed him the union literature they found in the mailboxes, he asked if they had any idea who had distributed the materials in the squad room. As a result, some names were "bantered about" but he never learned who had distributed the union materials. He also telephoned Art McCain, Pinkerton's human resources director for northern California, who advised LeBaudour to send out a letter stating the company's opposition to unionization and furnished LeBaudour with a draft of the language to be used. After some minor editing, LeBaudour distributed a letter to all of Pinkerton's VTA employees on June 28. LeBaudour's letter asserted his belief that Pinkerton management maintained a good relationship with its employees and invited employees "to communicate concerns to management at any time." He asserted his belief that a union would not help in "achieving a better relationship." In addition, he pointed out that it was not necessary for employees to sign authorization cards and that they should not feel pressured to do so. He told employees that it was "your own personal right to refuse to engage in union activities if you chose" and warned that if employees chose union representation, they would "have to pay union dues from [their] paychecks" even though the Union could not guarantee employees "extra pay, benefits or security." He also stated that "[t]his organization respects the rights of its employees to unionize if they choose to do so" but that union intervention at VTA was "unwarranted." He speculated that a union "could divide us and dilute our focus of being the best security force for VTA." LeBaudour concluded by stating that he would meet with employees in the next few days "to surface concerns and recommendations for improvement in our operations" and that he would ask the branch human resources staff to help.

In the next few days, LeBaudour spoke with several of the armed patrol officers as he had ready access to them and they to him. He asked if there were "things that the officers are unhappy with." He received some suggestions for changes and some complaints. As a result, LeBaudour made "some minor procedural changes." Meanwhile, Fay asked if Lance knew who had put the cards in the mailboxes, or if Lance himself had done so. Lance denied involvement and also denied knowledge of the person responsible.[3] Fay told Lance that he needed to find out who was responsible and that whoever it was would be "gone." A few days later, Fay asked Lance if he had any new information about the union organizing, and reiterated that whoever was behind it would be "gone."

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[3] However, at the hearing Lance admitted that he knew who had distributed the cards and materials in the squad room.

Pinkerton's Area Vice President Bill Fox wrote a letter similar to LeBaudour's on July 5. Fox' letter, distributed to all VTA officers, expressed Pinkerton's belief that the Union was unnecessary because it would not offer employees "any advantages over the current structure" and that "what [Pinkerton] provides is better than what the union could deliver."

Throughout the Union's organizing campaign, McClymont openly discussed unionization with fellow security officers, with VTA train operators and fare inspectors who came by the Santa Theresa stop, and with his immediate supervisors. On one occasion after he became a supervisor, Sergeant Licon warned McClymont to be careful because Pinkerton would possibly try to "kill off people who are pro-union," meaning terminate pro-union employees. In response, McClymont told Licon that he believed union representation for Pinkerton employees at VTA was "inevitable." McClymont likewise told Lieutenant McNeil, in the course of several discussions with her on the subject, that unionization Union was "inevitable" and that he was "plugging it." Lieutenant McNeil told McClymont that neither Pinkerton nor VTA wanted the Union.[4]

On Friday, July 5, McClymont's wife picked up his biweekly paycheck from Pinkerton's VTA office, and brought it to him to be signed for deposit because the rent on their apartment was due that day. However, the check was short by one day's pay. McClymont called McNeil, his S-51 that day, to report the short paycheck. He told her that even though this was a relatively small sum of money, it had a critical impact because he could not pay his rent due that day without it. McNeil promised to investigate the matter and get back to him. Later that morning speaking to Fay, McNeil drove to the Santa Theresa station to speak with McClymont.

When McClymont saw her approaching in the Pinkerton vehicle, he walked over to the parking lot to meet with her.[5] At that time, McNeil admitted to McClymont that she had made a mistake in preparing the payroll, which had led to the error in his check. She told McClymont that the mistake would be corrected but that he would not receive his supplemental pay until the following week, perhaps as late as Wednesday, because all of the administrative offices were closed for a long holiday weekend. McClymont asked whether something could be done such as writing "a local petty cash check or something to cover it at that point," since it was their fault and his rent was due. In the alternative, he asked if a Pinkerton official would write a letter for

[4] Licon denied that he talked to McClymont about the union. I do not credit his claim. Despite even the widely distributed management memos, Licon professed to know absolutely nothing about union activity among Pinkerton's VTA employees. Likewise, I do not credit McNeil's denial that McClymont ever told her that he favored the union or was pro-union. She, as well as Captain Fay, impressed me in their testimony as making a deliberate effort to minimize knowledge of the union activity among the VTA employees although they avoided the extreme stance taken by Licon. I find it particularly impossible to credit Fay's stonewalling on the subject of union talk in light of LeBaudour's testimony about his discussions with several armed officers regarding the union distribution in the squad room. Undoubtedly, many of those conversations occurred in Fay's presence.

[5] At the hearing, considerable controversy arose over where, precisely, McClymont and McNeil conversed about the paycheck matter. I credit McClymont's account and find that this exchange took place in the parking lot at a considerable distance from the train platform where VTA passengers waited for trains to arrive. As claimed by McClymont, any waiting passengers would have likely been well out of earshot. McNeil claimed in her testimony that they talked at a location much closer to the passenger platform. Her subsequently prepared Employee's Report states specifically: "When I arrived S/O McClymont met me in the parking lot." See Resp. Ex 10.

him acknowledging the mistake which he could give to his landlord. McClymont's requests prompted McNeil to call Captain Fay on a cell phone in McClymont's presence. After speaking with Fay, McNeil told McClymont that Fay had declined both his request for a temporary check and his request for a letter explaining the paycheck shortage. McNeil offered to let McClymont speak with Fay but he refused. McNeil also offered to loan McClymont the money. He refused that also.

After McNeil left the station, she spoke with Fay again by phone. During this exchange, Fay told McNeil to complete a written Employee's Report form describing the episode with McClymont.[6] Fay specifically instructed her that she should not complete a Disciplinary Warning form even though McNeil had authority to do so. McNeil testified that Fay will normally tell her to prepare a Disciplinary Warning form if Fay feels that the incident merits discipline. Fay claims that he told McNeil that he would prepare a disciplinary form and he explained that he did so to avoid having McNeil come in on overtime to attend the disciplinary conference with the employee and the area human resources manager at the Wyatt branch office. At such a conference, the written disciplinary warning is given to the employee to read, sign, and add a comment if he/she so desires.

McNeil's Employee's Report concerning her July 5 exchange with McClymont at the Santa Theresa station states that he referred to the Pinkerton VTA management in general as "sons of bitches," and Captain Fay in particular as "that son of a bitch," both while VTA passengers waited on the station platform. McNeil also reported that McClymont threatened to sue Pinkerton in small claims court if his landlord charged him a late fee because he was unable to pay his full rent on time. McNeil stated that she felt that "his conduct was disrespectful, insubordinate and demeaning."

McNeil denied that McClymont asked for a letter from Pinkerton noting the short paycheck to give to his landlord. McClymont denied using profanity or raising his voice to McNeil during their conversation about his short paycheck. Fay contradicted himself as to whether McNeil spoke to him on the phone in the presence of McClymont at the Santa Theresa station that day. At one point Fay testified that he did not overhear McClymont using profanity or raising his voice while speaking with McNeil but he later asserted that McNeil did not speak with him at all while she was at the Santa Theresa station.

McNeil signed the McClymont report on July 5 and put it in Fay's in-box. Fay signed the Employee Report and put it in LeBaudour's in-box on July 8 or 9. LeBaudour was on vacation that week and did not return to work until July 15. He recalled that so many other matters claimed his attention on his first day back that he did not actually see McNeil's Employee's Report about McClymont until July 16 or 17. He professed surprise and a little anger that Fay had not taken steps already to remove McClymont from the VTA staff. Around the time he read McNeil's report, she happened to pass by the office so LeBaudour called her in to discuss it with her. Fay was present at the time. LeBaudour claims that he pressed McNeil for details about the incident and that she confirmed that there were passengers nearby when McClymont's profane outburst occurred. McNeil confirmed that the incident occurred as she reported but she claimed that she made no recommendation concerning the incident.

[6] The Employee's Report form appears designed to provide a supervisor's factual recitation of an incident involving an employee.

LeBaudour claims that he thought of McClymont as resistant to supervision and belligerent.[7] However, LeBaudour knew of no disciplinary action taken against McClymont, and did not check for prior disciplinary documentation in McClymont's personnel file. When LeBaudour asked Fay "Haven't we had some supervision problems with this gentleman before?" and Fay responded affirmatively. According to LeBaudour, Fay characterized McClymont as "obstreperous and belligerent" but stated that he had not been disciplined in the past. LeBaudour asked Fay if McClymont was still on the VTA account. When Fay replied affirmatively, LeBaudour wrote on the Employee Report, "Ed, remove this officer from the account!"

LeBaudour explained that he removed McClymont from the VTA account because of the "altercation" he had with McNeil on July 5. He claims that he pointedly questioned McNeil about the location of their exchange and that she explained there were passengers nearby. When he learned that, LeBaudour asserts that he was "incensed."[8] In a subsequent e-mail to Art McCain, Pinkerton's Human Resources Manager for Northern California, LeBaudour stated:

> During the (July 16) meeting (with Fay and McNeil) it came to light that he (McClymont) has been obstreperous and belligerent in the past and obviously difficult to supervise. He doesn't seem to have as much of a problem with male supervisors as he does with Elizabeth. I'm uncertain as to the. . .reason for that. However, his conduct in public give the impression of an unprofessional and chaotic security company and we cannot afford to have officers like McClymont on the contract. We are in the "final stretch" of a 5 year contract (3 plus a 2 year extension). Next September (2003) we will begin negotiations with VTA on a new five year contract. Projections are that it will be well over 7 million dollars per year. Which means at a minimum that it will be a 35 million dollar contract. Therefore I exercised my authority as a Branch Manager and referred McClymont back to the Branch for reassignment. I did not terminate him.

LeBaudour denied that he knew anything about McClymont's union sympathies at the time he was removed from the VTA account. Although he acknowledged that there was on-going union activity, he claim the only activity he knew about was on the "armed side."

Fay claims that he subsequently prepared a Disciplinary Warning form and sent it along with McNeil's report to Bill Barker, the human resources manager at the Wyatt branch. He claims that the Disciplinary Warning provided for McClymont's removal from the VTA account for insubordination based on the incident reported in McNeil's report. Under the established procedures, Barker had the responsibility for arranging a disciplinary conference meeting with the employee (McClymont), the supervisor or manager issuing the discipline (Fay), and himself at the Wyatt branch. No disciplinary meeting for McClymont was ever arranged and, hence, it never occurred. Barker never testified.

On July 23, Lieutenant McNeil went to the Santa Theresa station near the end of McClymont's shift. She told McClymont that she needed his badge. She then stated: "I'm gone

[7] LeBaudour and McClymont have never met or spoken to each other.

[8] Only LeBaudour provided a detailed account of the discussion that allegedly occurred on July 16 in his office when the decision was made to remove McClymont. LeBaudour made no mention of McNeil's claim that McClymont threatened to sue in small claims court if his inability to pay his rent because of the short paycheck resulted a large overdue penalty.

three days, and when I come back I have to relieve one of my best officers."[9] When McClymont asked why he was being removed from the VTA account, McNeil told him that he should "call scheduling tomorrow, and when you call scheduling they will offer you an explanation." She told him that they did not fire people. Instead, she said, "we simply send people back to [the Wyatt] branch." After this initial conversation, McNeil and McClymont walked to the break room and he was relieved of his duties when his relief arrived at 4:00 p.m.[10]

The next day McClymont called the Wyatt branch and spoke with a scheduler named Chirs. He asked why he had been removed from the VTA account but Chris told him that he did not know. Chris suggested that he call Captain Fay but McClymont did not do that. No one from Pinkerton ever informed McClymont of the reason for his removal from the VTA account. McClymont also spoke with Chris about assignment to another account and expressed his wish to return to VTA. When Pinkerton had not reassigned him after three days, McClymont returned his uniform and shield to the Wyatt branch office. He hand delivered a letter stating that he was not quitting, but returning the issued property because Pinkerton had been unable to find other work for him. In the letter, McClymont wrote he would make arrangements for the issue of new uniforms if Pinkerton found work for him in the future.

During the next few weeks, McClymont spoke with the Wyatt branch schedulers in his unsuccessful attempt to obtain another assignment. He attended an interview for a position as a receptionist/security officer, but the job vacancy never materialized as expected. In late August, McClymont stopped contacting the Wyatt branch office. Pinkerton officially terminated McClymont on October 25, 2002.

B. Argument and Conclusions

1. Licon's Remark

The General Counsel contends that Respondent, through its agent Will Licon, violated Section 8(a)(1) of the Act by telling McClymont that Pinkerton would "kill off" pro-Union employees. Respondent claims that, assuming arguendo Licon did make the statement, he was merely expressing his personal opinion. General Counsel responds that a supervisor's expression of his personal opinion violates Section 8(a)(1) if the statement is threatening or coercive, as Licon's was. I agree. Accordingly, I find Respondent violated Section 8(a)(1) as alleged by Licon's conduct. *Intercon I (Zercom),* 333 NLRB 223 (2001); *Wilkler Brothers,* 236 NLRB 1371 (1978).

2. McClymont's Termination

In all cases alleging violations of Section 8(a)(3) turning on employer motivation, the General Counsel must, under *Wright Line*, 251 NLRB 1083, 1089 (1980), establish that union activity was a motivating factor in the employer's decision. This means that the General Counsel must establish that that the employee's protected conduct was, *in fact*, a motivating factor in Respondent's decision. *Webco Industries*, 334 NLRB 608, fn 3 (2001). In assessing whether the General Counsel has met his burden of persuasion, the fact finder may consider

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[9] July 23 fell on a Tuesday in 2002. McNeil did not work on Mondays.

[10] I based these findings on McClymont's uncontradicted testimony. McNeil professed to have no recollection that she relieved McClymont from his duties as a VTA officer on July 23. She did however identify a signed statement dated "7-23-02 1534" in her handwriting that states: I, Lt. McNeil, received (1) VTA Badge from S/O Paul McClymont." CP Ex. 3.

the explanation provided by the employer for the adverse action. *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (2nd Cir. 1990). The *Wright Line* test applies regardless of whether the case involves pretextual reasons or dual motivation. *USF Dugan, Inc*., 332 NLRB 409, 413 (2000). However, a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 225 NLRB 722 (1981, enf'd. 705 F.2d 799 (6th Cir. 1982). The elements of a discrimination case under Section 8(a)(3) include: (1) showing that the employee engaged in protected activity; (2) proving that the employer knew about the employee's protected activity; and (3) establishing the employer's hostility toward the employee's activity. *Best Plumbing Supply,* 310 NLRB 143 (1993).

If the General Counsel establishes that the employee's protected activity was in fact a motivating factor in the employer's decision, the burden of persuasion then shifts to the employer to establish, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in the protected conduct. *Id.* Because the employer bears the burden of persuasion, not merely production, *Transportation Management Corp.,* supra, it cannot simply recite a legitimate reason for the discharge but must "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

The General Counsel established with credible evidence that McClymont engaged in protected activity by signing an authorization card, distributing a couple of cards, and by discussing unionization with his fellow workers. Based on McClymont's credible account that he spoke favorably about what he perceived as the inevitable unionization of the Pinkerton's VTA work force to supervisors Licon and McNeil, I find the General Counsel has also established that Respondent knew of McClymont's pro-union sympathies. In fact, based on the record as a whole, I find it reasonable to infer that Respondent likely knew about McClymont's pro-union sympathies before it learned about the identity of any other union supporter. Clearly, Respondent's officials sought such information. By LeBaudour's account, he was in hot pursuit of the culprit who distributed union literature in the armed guards locker room as well as employee complaints about management around the same time that McClymont disclosed his pro-union leanings to Licon and McNeil.

Furthermore, I find Respondent harbored considerable union animus. Although the widely distributed written statements by Fox and LeBaudour express opposition to unionism in temperate tones, LeBaudour admitted that he questioned employees about the locker room distribution and solicited employee complaints ostensibly to blunt the organizing campaign. Licon's remark to McClymont, found unlawful above, and Lance's credible claim that Fay also boasted that union sympathizers would be terminated lead me to conclude that a substantially more hostile anti-union environment existed at Pinkerton's VTA operation than that suggested in the carefully worded distributions of Fox and LeBaudour.

In addition, I find Respondent's explanation for, and the timing of, McClymont's actual removal from the VTA account lends support to the General Counsel case. LeBaudour's charge that McClymont and McNeil had an "altercation" on July 5 wildly exaggerates what actually occurred. At the very worst (meaning if one credits the account least favorable to McClymont), the exchange on July 5 simply amounted to little more than a couple of impertinent statements, all arising from his short paycheck, an isolated happenstance with serious ramifications for him. The worst remarks attributed to him lack the kind of outright disobedience usually associated with insubordination. McNeil's accounts noticeably lack any cautionary warnings to McClymont one might expect from a supervisor when a subordinate crossed over the line of acceptable conduct. This fact contributes to my conclusion that McClymont did not engage in a public outburst of profanity with his supervisor on July 5.[11] Having observed McClymont while he testified, I find any type of profane public outburst on his part would have been entirely out of character. Moreover, the fact that McClymont was not actually removed from his post for nearly three weeks lends more support for the conclusion that Respondent's motive was other than the so-called July 5 altercation, especially when Fay's on-the-spot removal of Lance is considered. Finally, even when McNeil removed McClymont she avoided providing any reasons for this belated and drastic action and Respondent's officials, contrary to Pinkerton's normal procedures, made no subsequent effort to explain to McClymont their reasons for his removal. An employer's failure to give the employee a reason for his termination "alone would be enough to support an inference that the [termination] was discriminatory." *NLRB v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (5th Cir.).

I find Respondent failed to meet its burden of persuasion because, in my judgment, the affirmative defense lacks veracity. Respondent claims that McClymont's insubordination during the "short paycheck" conversation was so egregious as to warrant removal from the VTA account, rather than some intermediate disciplinary action. Its portrayal of McClymont's history as that of an obstreperous and belligerent employee has no supporting paper trail as found in other cases of employees who received one or more warnings before being terminated for insubordination. In addition, the claim that McClymont had a history of supervision difficulties is completely inconsistent with assessments by Lance and McNeil (stated at the time she removed him from his post on July 23), credited by me, that McClymont was an excellent employee. Moreover, LeBaudour's subsequent attempt to portray McClymont as a sexist subordinate in the e-mail to McCain also lacks support particularly from McNeil. No credible evidence shows that McClymont had suffered from an inability to get along with McNeil or any other supervisor during the period from July 5 to July 23, or any prior period.

As noted, McNeil seemingly did not attempt to caution McClymont about his alleged profane references in the vicinity of passengers or to suggest that his tone or manner was insubordinate. In fact, McNeil did not even think to complete an Employee Report on the incident until instructed to do so by Fay, and Fay did not think to prepare a Disciplinary Warning of any kind until after LeBaudour's directive to remove McClymont from the VTA account. Typically, Captain Fay would have submitted a completed Disciplinary Warning form to the human resources manager at the Wyatt branch, who would arrange a meeting with the supervisor and the offending officer to discuss the incident. For some reason not explained, this procedure was not followed in McClymont's case: the Disciplinary Warning form Fay supposedly completed could not be located and McClymont was never called to meet with Fay or any other supervisor to discuss the incident resulting in his removal. When McNeil removed McClymont on July 23, she deferred his inquiry as to the reason for this action to Wyatt branch personnel. In the end, no one ever told McClymont why he was being removed from VTA. Likewise, when LeBaudour was asked if he investigated McClymont's version of the July 5 incident, he replied, "Absolutely not." I agree with General Counsel's contention that Pinkerton's failure to fully investigate the incident lends support to a conclusion that an unlawful movtive existed for McClymont's removal. *Handicabs, Inc.,* 318 NLRB 890, 897 (1995), and the cases cited therein. (The failure to conduct a meaningful investigation of an incident advanced as a reason for an employee's discharge lends support to an inference of unlawful motivation.)

[11] I credit McClymont's assertion that he used no profanity while speaking with McNeil on July 5. I do not credit the claim that profanity was rarely used by Pinkerton managers, supervisors, and employees.

Despite the purported gravity of McClymont's offense, he continued to work as a security officer at the Santa Theresa station for a week after LeBaudour instructed Fay to remove him. Respondent explains that Pinkerton needed the week's time to train another officer for McClymont's position. General Counsel contends Respondent fabricated this explanation and points out that Pinkerton has previously discharged security officers "on the spot," without training a replacement officer. Pinkerton's high turnover rate means supervisors must often replace workers with little or no notice. Pinkerton employs "flex" officers who can fill in for absent officers on any shift, at any location. In the General Counsel's view, Respondent's unnecessary delay in removing McClymont detracts from its claim his removal resulted from insubordinate conduct, a legitimate motive, and supports an inference that his removal was motivated by his pro-union sympathies and activities. I concur.

In sum, I find that Respondent's failure to provide a truthful explanation of its reasons for removing McClymont from the VTA account compels the inference that this action was taken for unlawful reasons. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Accordingly, I find Respondent violated Section 8(a)(1) and (3) of the Act by removing McClymont from the VTA account.

Having concluded that McClymont's removal from the VTA account violated the Act, I find the claims and counterclaims concerning McClymont's failure to obtain further employment at another Pinkerton account after he was referred back to the Wyatt branch irrelevant. Suffice it to say, however, I credit McClymont's assertion that even though he expressed a preference for a shift and hours similar to what he worked at VTA which he could reach by public transportation, he did not foreclose consideration of other employment opportunities.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. California Security Officers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employee Paul McClymont, through its agent Will Licon, that it would "possibly try to kill off" employees who supported the Union, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By removing employee Paul McClymont from the VTA account, because he engaged in protected union activity, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that Respondent discharged McClymont because of his pro-union sympathies, Respondent will be ordered to reinstate him to his former position on the VTA account and make him whole for any loss of earnings and other benefits, less any net interim earnings, as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). In addition, Respondent will be required to expunge from its records any reference to his removal from the VTA account and his subsequent termination as provided in *Sterling Sugars*, 261 NLRB 472 (1982).

Inasmuch as the record as a whole warrants the inference that the unarmed officers, unlike the armed officers, do not regularly report to the River Oaks facility, Respondent will also be required to distribute signed and dated copies of the attached notice to the unarmed officers as it does with other in-house announcements. See e.g., *Wells Fargo Guard Services*, 252 NLRB 55 (1980).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Pinkerton, Inc., Santa Clara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Threatening employees with discharge or other discriminatory action if they support the Union, or engage in any protected concerted activity.

b. Discharging or otherwise discriminating against any employee for supporting the Union.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. Within 14 days from the date of this Order, offer Paul McClymont full reinstatement to his former job on the Santa Clara County Valley Transit Authority (VTA) account or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

b. Make Paul McClymont whole for any loss of earnings and other benefits suffered because of the discrimination against him in the manner set forth in the remedy section of the administrative law judge's decision.

c. Within 14 days from the date of this Order, remove from its files any reference to McClymont's unlawful removal from the VTA account and subsequent termination, and within three days thereafter notify him in writing that this has been done and that the removal from the VTA account and subsequent termination will not be used against him in any way.

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[12] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

d. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

e. Within 14 days after service by the Region, post at its River Oaks and Wyatt Branch facilities in Santa Clara, California, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Respondent must also duplicate and distribute signed and dated copies of the notice to all of its unarmed VTA officers in the same manner that it distributes other in-house announcements to them. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 26, 2003.

f. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: September 30, 2003 @ San Francisco, CA

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Administrative Law Judge

[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten you with discharge or other discriminatory action if you support the California Security Officers Union, or any other union.

WE WILL NOT discharge you or remove you from the Santa Clara Valley Transit Authority (VTA) account or otherwise discriminate against you for activities on behalf of California Security Officers Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Paul McClymont full reinstatement to his former job on the VTA account or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Paul McClymont whole for any loss of earnings and other benefits resulting from his removal from the VTA account, less any net interim earnings, plus interest.

WE WILL remove from our files any reference Paul McClymont's unlawful removal from the VTA account on July 23, 2002, and **WE WILL** notify him in writing that this has been done and that his removal and subsequent termination will not be used against him in any way.

PINKERTON, INC.
(Employer)

Dated ____________________ By ____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.